Filed 1/7/13 P. v. Brooks CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANDREA BROOKS, Defendant and Appellant.	H037775 (Monterey County Super. Ct. No. SS102506)

I. INTRODUCTION

Defendant Dandrea Brooks pleaded no contest to two counts of forcible rape (Pen. Code, § 261, subd. (a)(2))[1] in exchange for a stipulated sentence of 32 years in the state prison and dismissal of the remaining counts. The trial court sentenced defendant in accordance with the negotiated disposition and, among other things, imposed 10-year criminal protective orders as to each of the two rape victims (§ 136.2) and granted 768 days of presentence custody credit (§ 2900.5).

On appeal, defendant contends that the criminal protective orders were not authorized under section 136.2 and his presentence custody credits total 777 days when calculated correctly. The People concede that the 10-year criminal protective orders were not authorized under the version of section 136.2 in effect at the time of defendant's sentencing. In a subsequent letter to this court, defendant concedes that his presentence

[1] All further statutory references are to the Penal Code unless otherwise indicated.

custody credits were correctly calculated. As we will explain, we find both concessions appropriate and we will strike the protective orders.

Defendant has also filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his petition, defendant raises an issue concerning the adequacy of the trial court's advisement regarding the plea consequence of lifetime sex offender registration under section 290. We have disposed of the habeas petition by separate order filed this date. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

II. BACKGROUND

The information filed on January 12, 2011, charged defendant with seven counts in which Jane Doe I was the alleged victim: Forcible rape (§ 261, subd. (a)(2); count 1), forcible sexual penetration (§ 289, subd. (a)(1); count 2), assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); counts 3 & 7), making threats of violence (§ 422; count 4), false imprisonment by violence (§ 236; count 5), and child endangerment (§ 273a, subd. (a); count 6).

The information also charged defendant with six counts involving a different victim, Jane Doe II: Forcible rape (§ 261, subd. (a)(2); count 8), inflicting corporal injury on a spouse/cohabitant/parent of child (§ 273.5, subd. (a); counts 9, 10, 11 & 12), and making threats of violence (§ 422, count 13). Additionally, the information alleged that defendant had one prior strike conviction (§ 1170.12, subd. (c)(1)) and that he had served one prior prison term (§ 667.5, subd. (b)).

On September 26, 2011, defendant entered into a plea agreement in which he pleaded no contest to count 1 (forcible rape of Doe I, § 261, subd. (a)(2)) and count 8 (forcible rape of Doe II, § 261, subd. (a)(2)) and admitted the prior strike conviction in exchange for a stipulated sentence of 32 years in the state prison and dismissal of all remaining counts. As part of the plea agreement, defendant executed a written waiver of "all rights regarding state and federal writs and appeals. This includes, but is not limited to, the right to appeal my conviction, the judgment, and any other orders previously

issued by this court. I agree not to file any collateral attacks on my conviction or sentence at any time in the future."

In November 2011, defendant filed a motion to withdraw his plea on the grounds that at the time he entered into the plea agreement, he "was under too much pressure to plead nolo contendre" and he "panicked and did not consider the offer carefully when making the plea." The trial court denied the motion to withdraw plea in its order of December 1, 2011.

Thereafter, at the sentencing hearing held on December 1, 2011, the trial court imposed the stipulated sentence of 32 years and, among other things, imposed 10-year criminal protective orders with respect to Doe I and Doe II. The court also granted defendant presentence custody credit of 768 days.

On December 22, 2011, defendant filed a notice of appeal and an application for a certificate of probable cause on the ground that defendant had entered into the plea agreement "while his free judgment was overcome by duress." The trial court denied the application for a certificate of probable cause on January 8, 2012.

III. DISCUSSION

A. *Section 136.2*

At the conclusion of the December 1, 2011 sentencing hearing, the trial court issued two criminal protective orders from the bench:

"THE COURT: Okay. So the Court will order a ten-year criminal protective order as to each of the Jane Does in this matter, as well as to each of their children. You'll receive their names in writing on these criminal protective orders. You are not to call; you're not to e-mail; you're not to text any of them. You are to stay completely away. You are not to harm, strike or threaten any of them. You are not to harass them. You are not to send them letters. You are not to contact them through any third party. So you need to have absolutely no contact with any of them. Any violation of this criminal protective order will get you into further trouble. Do you understand that?

"THE DEFENDANT: Yeah."

The minute order for the December 1, 2011 sentencing hearing states that the criminal protective orders were issued pursuant to section 136.2 and this is a domestic violence case under section 13700.

Defendant argues that the criminal protective orders imposed in this case are not authorized under section 136.2 and requests that the orders be stricken. He explains that section 136.2 authorizes the imposition of a criminal protective order to protect the victims and witnesses involved in a pending criminal proceeding, and does not apply once the proceedings conclude and the defendant is sent to prison. Defendant also argues that his written waiver of appellate rights does not prevent him from challenging the orders on appeal, since the imposition of criminal protective orders was a matter left unresolved by the plea agreement.

The People concede that defendant's waiver of appellate rights does not preclude his appellate challenge to the criminal protective orders. They also concede that the trial court erred in imposing the criminal protective orders under section 136.2, since it was well established, before section 136.2 was amended effective January 1, 2012, that a criminal protective order issued under section 136.2 could not extend beyond the pendency of the criminal action.

We find the People's concessions to be appropriate. A "general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing errors [unresolved by the plea agreement] occurring subsequent to the plea, ..." (*People v. Panizzon* (1996) 13 Cal.4th 68, 85, fn. omitted; see also *People v. Kennedy* (2012) 209 Cal.App.4th 385, 391 (*Kennedy*).) Since it is undisputed that defendant's plea agreement left unresolved whether criminal protective orders would be imposed at the time of sentencing, we agree that defendant's waiver of appellate rights does not bar his appellate challenge to the criminal protective orders. Further, defendant's failure to object during the trial court proceedings to the criminal protective

orders as statutorily unauthorized does not preclude appellate review, since a claim that a sentence is unauthorized may be raised for the first time on appeal. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 995-996.

We also agree that the criminal protective orders imposed in this case were not authorized by the version of section 136.2 that was in effect when defendant was sentenced in December 2011. At that time, former section 136.2, subdivision (a) "authorize[d] the trial court in a criminal case, 'upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,' to issue orders (generally referred to as 'criminal protective orders') including an ex parte no-contact or stay-away order pursuant to Family Code section 6320; an order that the defendant or any other person before the court not violate any provision of section 136.1, which prohibits intimidation of victims or witnesses; an order that the defendant have no communication with the victim or a specified witness except through an attorney; and an order protecting the victim of a violent crime from all contact by the defendant." (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 950, fn. omitted.)

The appellate courts had construed former section 136.2 to authorize a criminal protective order that is limited in duration to the pendency of criminal proceedings, since "[i]ts 'only purpose is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal.' [Citation.]" (*People v. Ponce* (2009) 173 Cal.App.4th 378, 383 (*Ponce*); see also *People v. Selga* (2008) 162 Cal.App.4th 113, 118 (*Selga*).) Thus, former section 136.2 did not authorize a three-year criminal protective order that was not limited to the pendency of the criminal proceeding. (*People v. Stone* (2004) 123 Cal.App.4th 153, 159-160.)

In 2011, the Legislature responded to the decisions in *Ponce* and *Selga* holding that criminal protective orders operate only during the pendency of criminal proceedings by amending section 136.2 to add subdivision (i). (Stats. 2011, ch. 155, § 1; Sen. Rules

Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 723 (2011-2012 Reg. Sess.) as amended May 2, 2011, p. 4.)

Subdivision (i) of section 136.2 became effective on January 1, 2012. (Gov. Code, § 9600, subd. (a) [effective date of non-urgency legislation].) It provides: "In all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family." (§ 136.2, subd. (i).)

Although defendant pleaded no contest to forcible rape (§ 261, subd. (a)(2)), which constitutes a crime of domestic violence as defined by section 13700 (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139), he was sentenced in December 2011, prior to the January 1, 2012, effective date of section 136.2, subdivision (i). Therefore, the trial court lacked statutory authorization to impose a 10-year criminal protective order in this case and we will direct the court to strike the oral criminal protective orders imposed during the December 1, 2011 sentencing hearing.

B. *Presentence Custody Credits*

In his opening brief, defendant contends that the trial court's grant of 768 days of presentence custody credits should be increased to 777 days, in order to accurately reflect his actual time in presentence custody. The People assert that the trial court correctly calculated that defendant is entitled to 768 days of presentence custody credit under section 2900.5, subdivision (a), since defendant was arrested on October 25, 2009, and

sentenced on December 1, 2011. After filing his opening brief, defendant advised this court in his letter filed on August 23, 2012, that he now concedes that his presentence custody credit was correctly calculated. We find defendant's concession to be appropriate.

"[S]ection 2900.5 governs the award of presentence custody credits. That section provides, in pertinent part: '(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody . . . all days of custody of the defendant . . . including days . . . credited to the period of confinement pursuant to Section 4019 . . . shall be credited upon his or her term of imprisonment. . . . If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. . . . [¶] (b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.' (. . . , § 2900.5, subds. (a), (b).)[2]" (*Kennedy*, *supra*, 209 Cal.App.4th at pp. 391-392.)

Under section 2900.5, therefore, "[e]veryone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct. [Citations.]" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Having reviewed the dates of defendant's presentence custody, from October 25, 2009 until the December 1, 2011 sentencing hearing, we conclude that the parties and the trial court correctly calculated that defendant is entitled to 768 actual days of presentence custody credit under section 2900.5.

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[2] Section 2900.5 was amended effective April 1, 2011, operative October 1, 2011. (Stats. 2011, ch. 15, § 466.)

IV. DISPOSITION

The judgment is ordered modified by striking the criminal protective orders orally imposed during the December 1, 2011 sentencing hearing. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.